

Association of Taxation and Management Accountants

ABN 32 002 876 0208



**SUBMISSION ON THE EXPOSURE
DRAFT TAX AGENT SERVICES BILL
2008 AND RELATED REGULATIONS**

The Association of Taxation and Management Accountants (ATMA) welcomes the opportunity to provide a further submission to provide additional input into the ongoing development of the exposure draft legislation and regulations regarding tax agent services.

Rather than complete an exhaustive document the ATMA has decided to comment on areas that may impact on small practitioners that form the majority of ATMA membership.

The ATMA has taken part in the confidential consultations over the past 17 years and supports any act that brings more value and professionalism to the accounting/tax profession.

The accounting/tax profession has been waiting a long time to have an act to recognise our profession in a similar vain to that of the various Legal Practitioners Act etc.

The ATMA is pleased to see that some amendments have been made to the proposed legislation following submissions made by ATMA and other interested parties. Some of our concerns have been addressed in the revised draft legislation referred to the Senate Committee.

The ATMA is pleased to see within the proposed framework a number of worthwhile measures including;

- (1) the ability of a greater range of appropriately qualified and experienced tax professionals to become registered tax agents,
- (2) the ability of registration for BAS agents,
- (3) the introduction of prescribed professional indemnity insurance,
- (4) the introduction of required CDP/CPE hours.
- (5) The introduction of a Code of Practice of Professional Conduct.

The key elements of the regulatory reforms in this proposal are:

- (1) The establishment of a National Tax Practitioners Board to replace the existing state based Boards.
- (2) registration and regulation of entities providing business activity statement (BAS) services as BAS agents.
- (3) a legislated Code of Professional Conduct to govern tax agents and BAS agents

- (4) a wider and more flexible range of disciplinary sanctions which may be imposed by the Board.
- (5) civil penalties and injunctions to replace criminal penalties for certain misconduct by agents and unregistered entities: and
- (6) "Safe Harbour" which provides that, in certain circumstances, taxpayers who engage a tax agent or a BAS agent are not liable to certain administrative penalties that would otherwise ordinarily apply for making a false or misleading statement resulting in a tax shortfall amount, or for lodging a document late.

We accept the Government's concern regarding the rights of consumers of tax agent services. But to build a legislative framework around consumer protection principles is to create a legal minefield.

We recognise the need to update the rules that regulate tax agents. The current regime is out of date and out of step with current practices, the self-assessment regime and the general commercial environment, especially so since the introduction of the GST system on 1st July 2000.

The most notable changes have been the introduction of the self-assessment system which has shifted the burden of complying with tax laws onto taxpayers.

This, along with a significant increase in the complexity of our tax laws has seen a larger proportion of taxpayers using the services of tax agents to lodge their tax returns. The proposed regime now wants to shift the burden away from the taxpayer to the Tax Agent.

The aim being to offer taxpayers more consumer protection when they engage the services of a Tax Agent or a BAS Agent.

However, the proposed Code of Professional Conduct and safe harbour consumer protection measures provide little in the way of protection for Tax Agents and BAS Agents. Materiality, de minimis thresholds or no reason to believe that the information was incorrect type safeguards, have not been built into the proposed legislation to protect Tax Agents and BAS Agents. If Tax Agents and BAS Agents are to bear some of the responsibility under self assessment on

behalf of their clients, there must be appropriate safeguards in place to protect them from penalties.

Tax Agents would be concerned that they could be in breach of the code of practice if they claimed a tax deduction in their own tax return or a client's tax return and a court later holds that such amounts are not deductible.

The proposed Code of Professional Conduct and safe harbour protection measures are shifting too much of the responsibility under self assessment to Tax Agents and BAS Agents

The ATMA is pleased to see the raising of standards for BAS service providers (bookkeepers) through registration and regulation. However, apart from the recognition of professional associations of BAS Agents there is nothing to encourage bookkeepers or BAS Agents to join any of the professional associations of BAS agents (usually bookkeepers).

These organisations of bookkeepers, which are not Recognised Professional Associations for tax agents' registration purposes, can do nothing apart from training and professional development of their members.

What is a BAS service?

Section 90-10 Meaning of BAS service.

A BAS service is a tax agent service:

(A) That relates to:

(i) ascertaining the liabilities, obligations or entitlements of an entity that arise, under a BAS provision; or

(ii) advising an entity about the liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a BAS provision; or

(iii) representing an entity in their dealings with the Commissioner in relation to a BAS provision; and

(B) that is provided in circumstances where the entity can reasonably be expected to rely on the service.

(2) a service provided by a person in the course of performing duties in the ATO is not a BAS service.

(3) a service specified in the regulations for the purposes of this subsection is not a BAS service.

Many Tax Agents believe the term 'BAS provision' is effectively defined to mean the provision of services and related GST taxable items necessary to complete and lodge a BAS return. These items include GST, wine tax, luxury car tax and the fuel tax law.

Many Tax Agents believe that the above definition is too wide as it is not limited to the preparation of a BAS return, but also allows BAS Agents to provide advice on complex indirect taxes such as GST for which they do not have the required technical expertise. Advice on any other tax law or matter can only be given a registered tax agent or legal practitioner.

Many Tax Agents consider the draft legislation released in May 2007 to be confusing and misleading. Many consider that the term "tax practitioner" would confuse members of the general public when considering using the services of a registered tax agent or a BAS Agent.

The ATMA is pleased to see that the term "BAS Service Provider" has been changed to BAS Agent as this more closely reflects what BAS Agents actually do. This term BAS Agent was recommended in previous submissions by the ATMA as well as other RPAs

BAS Agents are predominately bookkeepers.

Members of the public are generally aware that there is a significant difference between a Tax Agent and a bookkeeper and the ATMA considers the terms Tax Agent and BAS Agent distinguishes between the two different types of services that are offered by each type of agent.

In previous formats of the proposed draft the role of Recognised Professional Associations (RPAs) was enhanced so that members of RPAs with the appropriate Public Practising Certificate (PPC) were deemed to be eligible for registration as a tax agent and their registration was to be certain.

The ATMA has always agreed with this proposal with the exception of the satisfaction of the “fit & proper person” test. The ATMA has always considered the “fit & proper person” test should always remain with the Board as they were privy to information that was not available to the RPAs.

It was at one time proposed that if a member of an RPA with a PPC from his/her RPA applied for registration as a tax agent with a supporting letter from the relevant RPA, registration as a tax agent would be certain.

At more recent meetings with Treasury some of the professional accounting bodies backed away from this “certainty” of registration process for members of RPAs with the relevant PPC. This was in fear of possible litigation where the relevant RPAs supported the application of an individual who subsequently was shown to be unfit for registration. This was despite assurances from Treasury that it would be the Board that approved the registration of a person and not the relevant professional association.

The ATMA still holds the view that a member of an RPA with that RPA’s PPC should be eligible for registration as a tax agent subject to the “fit & proper person” test determined by the Board.

Further the ATMA considers that all the existing requirements as to experience etc apply to those applicants **who are not members of an RPA.**

It is disappointing to see this proposal has been removed from the Exposure Draft legislation and is one of the reasons that many members of RPAs feel disgruntled and let down by their respective professional associations.

Basically the requirements for eligibility for registration as a Tax Agent remain the same as stated in the existing legislation.

The only departure from the existing legislation has been the relaxing of the employment requirements for members of RPAs. Under the existing legislation it is necessary to be employed by a registered tax agent in order to gain registration. Under the draft legislative proposals experience gained as a contractor to a Tax Agent is now taken into account.

This is an improvement over the existing requirements but is far removed from the original proposals for members of RPAs with PPCs.

Part 2 Registration Section 20-10 states that ***“The regulations may provide a system to allow the Board to accredit professional associations for the purpose of recognition of professional qualifications and experience that are relevant to the registration of individuals as”registered tax agents and BAS agents.”***

The EM at 2.55 states that ***“The regulations may provide a system to allow the Board to accredit professional associations, including tax and accounting professional associations, associations of bookkeepers and legal professional associations, for the purpose of recognising professional qualifications and experience for registration purposes”*** (Section 20-10)

Does this mean that membership of an RPA (with a PPC) would meet the prescribed qualifications in Paragraph 20-5(1) (b)?

The introduction of registration of BAS Agents is a recent innovation and is designed to bring into the framework those suitably qualified bookkeepers to assist those overworked accountants and taxpayers to meet their tax obligations.

The ATMA supports this proposal but stipulates that BAS Agents (usually bookkeepers) are not Tax Agents and usually do not generally have the same qualifications as tax agents and accountants.

The ATMA understands that if an applicant for registration as a BAS Agent is a voting member of an RPA and satisfies the other conditions of subsection 251L(6) and 251L(7) of the old law that there is no further need for that applicant to produce educational qualifications.

Schedule 2 Transitional Provisions Paragraph 4 (1-3) provides special rules relating to the provision of BAS services by certain individuals so that they are deemed to be registered as BAS agents for the transitional period.

Bookkeepers have for too long being, unrepresented, unregulated and unrecognised for the valuable work that most of them do. Certainly there are unscrupulous bookkeepers just as there are unscrupulous accountants and tax agents.

As a result the proposed legislative requirements for registration as a BAS Agent are not as onerous as those for Tax Agent registration, nor should they be.

The proposed legislative framework recognises that there are professional associations of bookkeepers or BAS Agents and that these associations must meet certain criteria for recognition.

In a previous submission with the other accounting bodies it was suggested that the minimum required voting members of a Recognised BAS agent Association be set at 1000 members (or a lesser number) at the discretion of the Board. The draft Tax Agent Services Regulations 2008 in Part 2 para 202(b) expands this definition further by stating “**at least 500 voting members who are BAS agents registered under the Act; or both.**”

The ATMA recommends that the minimum number of voting members of a Recognised BAS Agents Association be amended further by the addition of a subparagraph allowing the Minister, or at the discretion of the Board, to approve a lesser number of voting members or registered BAS agents during the transition period. This will allow the BAS Associations that meet all of the other requirements except for the required number of voting members to be approved in the short term.

There are several associations for BAS agents (usually a bookkeeper association) and with the relative new entry of these organisations to the professional services sector it is extremely unlikely that any of the bookkeeper associations would meet the minimum number of 1000 voting Members and/or 500 voting members who are BAS agents registered under the ACT, to gain recognition as a Recognised BAS Agent Association.

Bearing in mind that the proposed framework recognises the existence of these associations there is nothing within the framework to encourage BAS agents to join such organisations.

If the Government is serious about regulating Recognised BAS Agent Associations as separate entities from Recognised Professional Associations there must be some benefit, apart from training or education in the legislation to encourage bookkeepers or BAS agents to join such Recognised BAS Agents Associations.

If there is no real benefit or perceived benefit within the legislative framework than the very people the legislators want to regulate will register as BAS agents but will not join one of the bookkeeper associations because they can see no value in doing so.

The ATMA supports the majority of the exposure draft legislation and related materials.

However, it is clear that the proposed legislation needs to be amended further regarding BAS agents and the Recognised BAS Agent Associations in order for such Associations to gain membership to the levels required to gain registration as a "Recognised BAS Agent Association".

The ATMA, although supportive of the current Exposure Draft on the Tax Agent Services Bill raises the following issues of concern:

Part 2 – Registration

Division 20

The ATMA supports the introduction of Professional Indemnity Insurance at a level acceptable to the Board for all tax agents and BAS agents at subsections 20-30(3) and 30-10(13).

The ATMA in principal supports the registration process

The Code of Professional Conduct.

The ATMA accepts that one of the aims of the proposed legislation is to provide greater consumer protection. If the public want to have confidence in the tax industry/profession to help them meet their own tax obligations, it is vital that the tax industry/profession is able to match community expectations.

We also accept that the proposed Code of Professional Conduct is a positive step to introduce minimum standards in the tax industry/profession.

The ATMA acknowledges that the wording of several of the provisions in the Code of Professional Conduct and their explanations in the EM have been narrowed or otherwise adjusted to make clearer the obligations of Tax Agents and BAS Agents. The focus has been clarified as being on the ultimate outcome rather than the process employed to reach that outcome.

Our major concern with respect to the amended proposed Code of Professional Conduct is how it can be administered and applied in practice.

Further the proposed Code of Professional Conduct transfers too much responsibility under self assessment onto Tax Agents and BAS Agents.

In our previous submission in 2007 the ATMA sought further clarification as to the extent of what is “reasonable care” in terms of Section 30-10(9).

The ATMA considers the explanations regarding “reasonable care” in the EM at paragraphs 3.39 to 3.59 solve most of the concerns previously raised by the ATMA.

We note that the Board can later develop guidelines on how the Code of Professional Conduct is to be applied in practice. We are concerned that the proposed Bill uses principle based drafting which places heavy reliance on the EM to fill any gaps and to give meaning to the proposed legislation.

Such gaps in the legislation should not be left to the Board to consider without suitable direction.

The use of principle based drafting creates uncertainty for both tax agents and BAS agents.

It is possible that the courts could interpret certain provisions based on the exact wording of the particular paragraph without any reference to further explanations within the EM.

The EM needs to provide appropriate guidance on how the Code of Professional Conduct is to be administered in practice.

The question must be asked how tax agents or BAS agents can at all times maintain the best interests of their clients when they have a simultaneous responsibility owed to their clients, the community, the Board and the ATO.

It is therefore essential that any inconsistencies and contradictions within the draft legislation and the EM are removed.

In addition the examples in the EM provide some assistance on how these potential conflicts can be managed in a practical way. There needs to be a greater number of examples under each of the principles of the Code of Professional Conduct to cover a wide range of practical issues that may arise.

Most of the Code of Professional Conduct under Division 30 -10 is so widely drafted that it could invariably be used against the Tax Agent or BAS Agent.

Another major concern relates to Tax Agents and BAS Agents being required to comply with a legislated Code of Professional Conduct. Currently unless a Tax Agent or BAS Agent is also a member of a Recognised Professional Association, or a Recognised BAS Agent Association they are not governed by a Code of Professional Conduct.

The introduction of a Code of Professional Conduct therefore provides an opportunity to raise standards in the industry, an aim which we support.

There are, however, a number of issues regarding the administration of the Code of Professional Conduct and how it can be applied in practice. A key point of the proposed Code of Professional Conduct is the view that the “interest of the client is paramount” yet this requirement is heavily qualified and even contradicted to the extent that a Tax Agent or BAS Agent must have regard to responsibilities owed to the community through the law.

The interests of the client are not necessarily those of the Government or the ATO.

Additionally, if a Tax Agent or BAS Agent is able to find a tax benefit which does not breach any anti-avoidance provisions is that agent in breach of the Code of Professional Conduct simply because of the responsibility owed to the community by the Tax Agent or BAS Agent?

Examples in the EM provide little assistance on how these potential conflicts can be managed in a practical way. There needs to be greater number of unambiguous examples under each of the

principles of the Code of Professional Conduct to cover a wide range of practical issues that may arise.

Safe Harbour & Obligations under the Code of Professional Conduct

In order for taxpayers not to be liable for certain tax shortfall penalties when they engage a Tax Agent or a BAS Agent they need to demonstrate that they have provided all the relevant taxation information. Our concern is how will taxpayers who are not tax experts know what they would reasonably be expected to provide?

The taxpayer has an obligation to bring to the Tax Agents or BAS Agents attention all the information which they would reasonably expect to be necessary. The use of subjective statements has the potential to introduce administrative difficulties in the application of this measure.

When you combine this obligation with S30-10(9) of the Code of Professional Conduct which states that ***a registered tax agent or BAS agent must take reasonable care in ascertaining a client's state of affairs, to the extent that ascertaining the state of those affairs is relevant to a statement you are making or a thing you are doing on behalf of the client***, means that Tax Agents and BAS Agents take on a significant portion of responsibility under self assessment. The EM at Para 3.51 states that ***“tax agents and BAS agents are not responsible for the veracity of the tax information provided to them by their clients, they are required to do what is reasonable in the circumstances”***.

The EM at Para 3.63 states that ***“the responsibility for the accuracy and completeness of the particulars and information required to comply with the taxation laws vests with the client”***.

If this is the case why is it the obligation of Tax Agents and BAS Agents to take reasonable care to ascertain the state of affairs of the client and impose a similar obligation on the accuracy and completeness of the information provided to them?

These obligations will impose significant responsibilities on Tax Agents and BAS Agents. In effect the tax practitioner will be required to conduct a quasi audit on each of their clients. How else can Tax Agents and BAS Agents assure themselves that the information provided represents the true state of affairs?

Other issues arise such as:

- What will you need to show to prove you have undertaken reasonable care?
- What information can a Tax Agent or BAS Agent rely on without further checking being required?
- Why Tax Agents cannot rely on information provided from a BAS Agent?

The EM at paragraphs 3.39 to 3.59 seems to solve most of the concerns of the ATMA in relation to “reasonable care”

It is essential that “safe harbour” provisions be included for registered Tax Agents who use a BAS Agent to provide BAS services on their behalf. The same “safe harbour” provisions should apply where a client has used the services of a BAS Agent and gives that work to a Tax Agent for the purpose of preparing a tax return or other tax agent services.

This ensures that the Tax Agent is not penalised for any errors made by a BAS Agent who will be subject to the same Code of Professional Conduct.

Further there are commercial realities to consider. Will taxpayers be prepared to pay for what will be required by Tax Agents and BAS Agents in order to comply with the Code of Professional Conduct?

Most agents operate under severe time constraints which makes compliance of the requirements of the code almost impossible. The introduction of “safe harbour” provisions for Tax Agents using BAS Agents will go a long way towards making compliance easier for all parties involved and protect the consumer at the same time.

Independence of the new Tax Practitioner Board.

The EM makes it quite clear that the Board has responsibility for regulating the provision of tax agent services in all States and Territories, independent from the ATO; there are instances where the ATO has to be relied upon to provide administrative support such as the secretariat.

The Board is to be funded via a Special Account under Section 20 of the ***Financial Management and Accountability Act***.

The EM states at Para 5.14 that “***The Board will be a statutory body that falls within the Treasury portfolio. The statutory functions and powers are vested in the Board independently of any other body including the ATO. Although the secretariat to the Board will be provided by the ATO, the secretariat must take its directions for the administration and operation of the Board from the Board itself***”

The Board will consist of a Chair and at least 6 other members. The Minister is responsible for appointing members of the Board and the Chair. The Chair cannot be an ATO officer.

The existing administrative arrangements between the state based Tax Agents’ Boards and the ATO has created an impression amongst Tax Agents and taxpayers alike that the boards are part of the ATO. It is important that the independence of the new Boards from the ATO is established from the very beginning.

The ATMA supports the concept of replacing state based Tax Agents’ Boards with a national Board but we are still concerned with the issue of independence.

The EM at para 5.57 states that “***Although ATO employees (who are appointed or engaged under the Public Service Act 1999 may hold Board membership (other than as the Chair – refer to paragraph 5.52), it would be unusual for more than two ATO employees to be appointed to the Board at any one time. The Bill does not require there to be any ATO employees on the Board.***

The ATMA considers that Tax Agents and BAS agents would once again see the Board as an appendage to the ATO – admittedly a statutory authority but still too close to the ATO.

In order for the Board to be perceived and to act independently, it is important that any functions the Board undertakes under the new legislative framework are performed by non ATO personnel. Having substantial links back to the ATO will do nothing to reverse the perception that the Board is merely an arm of the ATO.

Investigative Committees.

The proposed establishment of investigation committees to investigate complaints is another concern.

Most professional bodies who have codes of conduct have trained staff to undertake necessary work to investigate complaints. There are no assurances that investigative committees will act consistently when they undertake investigation procedures and there is a potential that ad hoc investigative committees will lead to different outcomes for similar factual situations. To maintain independence, investigative personnel should not be sourced from ATO personnel. Given the potential sanctions that may be imposed by the Board, it is imperative that the investigative process operate to produce fair, transparent and consistent outcomes.

The initial contact point for the communication of a complaint will be with the Board Secretariat who also happens to be ATO person appointed by the Commissioner of Taxation. It is then up to the Secretariat to bring the matter to the attention of the Board to decide whether the complaint is one of substance and whether an investigation is warranted.

The issues the ATMA have with respect to the investigative process are as follows:

- Investigative committee members are not full time expertly trained persons.
- The ad hoc establishment of investigative committees as and when needed arises from an established pool of people.

- ATO officials may be selected as investigating committee member/s.
- An investigative committee can consist of one person.

Given that the Board or investigating committee is not bound by the rules of evidence, and the investigations are to be conducted with as little formality as possible, it raises fears as to whether this process will result in satisfactory outcomes for both Tax Agents and BAS agents.

Given the sanctions that can be imposed the ATMA believes that it would be more appropriate to have full time suitable qualified persons who undertake necessary investigative functions.

The ATMA recommends that only individuals who have years of practical experience should be persons who undertake these investigative tasks.

The ad hoc nature and composition of the investigative committees is not considered the most appropriate method to deal with complaints.

Subdivision 30-B your liability for administrative sanctions.

The ATMA is pleased to see that a range of sanctions are available and not just suspension or termination of registration.

Part 4 – Termination of registration
Division 40 – Termination of registration.

The ATMA in general supports this provision.

Transitional Measures.

There are no transitional measures to assist tax agents in making necessary changes to improve standards. The proposed new regime will force some tax agents to improve their standards and this can only be a good thing for the profession in the long run but it will also put pressure on fees charged to lodge tax returns, provide advice etc.

Given the state of the tax agent profession, the release of these proposed measures will put further pressure on the profession. There are no transitional measures to alleviate some of the potential fallout from the introduction of the proposed new legislative framework. Increased regulation in a profession which is under stress will drive more Tax Agents out of the profession. The average age of Tax Agent has been steadily rising due to lack of new entrants entering the profession. The work of most Tax Agents is compliance oriented and the financial returns are not seen as sufficiently attractive to encourage enough new entrants into the profession to replace retiring Tax Agents. Tax Agents who remain are suffering a high level of fatigue resulting from tax reforms which have taken place since the introduction of GST.

Will the public be supportive of higher fees in an effort to raise standards?

Is it a case of allowing the number of Tax Agent numbers to fall in the short term, providing remaining Tax Agents with the ability to raise fees? This may over time increase the financial rewards which is essential for attracting new entrants. Only time will tell. However there does not appear to be any long term considerations on how these proposals will impact on the profession.

Tax Agents are a vital cog in the administration of the tax system and the community relies heavy on Tax Agents to assist them in meeting their lodgment obligations. Anything which affects the supply of Tax Agents will have implications for the taxpaying community.

There has to be a transition period to allow the profession to undertake necessary changes regardless of what form and shape the new legislative framework ends up looking like.

Training

The EM states that organisations which satisfy the requirement of Recognised Professional Associations may assist the Board by providing Board recognised courses for on-going professional education and disciplinary purposes.

The revised draft allows for courses provided by various organisations including RTOs, tertiary institutions and RPA's that have been approved by the Board will satisfy the requirement for on-going professional education.

The ATMA supports this move.

Given the amount of consultation that this Bill has been given and the amount of time (17years) that the proposed legislative changes have been under development, it is pleasing to see the process coming to a final conclusion.

Many of the concerns raised by the ATMA and other interested parties in prior submissions have been further clarified by the Tax Agent Services Bill 2008 that was introduced into the House of Representatives in November 2008.

It is essential that when the Bill is finally enacted that provision be made to allow the legislation to be revisited so that any unexpected problems regarding registration of Tax Agents and BAS Agents can be rectified.

The ATMA in general supports the Exposure Draft of the Tax Agent Services Bill 2008.

If you would like to discuss any aspect of this submission please contact the writer on 02 9744 5153.

A handwritten signature in black ink, appearing to read 'Robert Duncan', with a stylized flourish at the end.

Robert Duncan
President ATMA
12th January 2009